

STATE OF CALIFORNIA  
DECISION OF **THE**  
PUBLIC EMPLOYMENT RELATIONS BOARD



KLAMATH-TRINITY TEACHERS	)	
ASSOCIATION, CTA/NEA,	)	
	)	
Charging Party,	)	Case No. SF-CE-1242
	)	
v.	)	PERB Decision No. 717
	)	
KLAMATH-TRINITY JOINT UNIFIED	)	December 30, 1908
SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
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Appearances: Ramon E. Romero, Attorney, for Klamath-Trinity Teachers Association, CTA/NEA.

Before Porter, Craib, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Klamath-Trinity Teachers Association, CTA/NEA (Association) of the regional attorney's dismissal of its unfair practice charge for failure to state a prima facie case. The Association alleged that the Klamath-Trinity Joint Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)<sup>1</sup> by failing and refusing to negotiate

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<sup>1</sup>**EERA** is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5(a), (b) and (c) states:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

in good faith with the Association regarding the decision and/or effects of the decision to transfer or subcontract work out of the bargaining unit.

In September 1987, teachers Nelson and Johnson began teaching French and Native American Studies at Hoopa Valley High School during the regular school day. The Association asserts that these courses are high school level introductory courses and not "advanced scholastic" courses within the meaning of Education Code section 48800, and that it is not the intent of the District "to provide educational enrichment opportunities to a limited number of eligible pupils. . . ."

On December 2, 1987, the Association learned that Nelson and Johnson were not members of the bargaining unit but were employed and paid by the College of the Redwoods. The Association alleges that there were members of the bargaining unit who were certificated and competent to teach the disputed courses. According to the Association, it has been the past practice in the District to have all new courses absorbed by current bargaining unit members or to hire new members of the Association to teach the new courses.

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employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

On appeal, the Association asserts that: (1) the regional attorney failed to assume that all facts alleged in the charge are deemed true; and (2) the District's conduct constitutes subcontracting or transferring of bargaining unit work without providing the Association with notice or an opportunity to bargain the decision and/or its effects. The District did not respond to the appeal.

#### DISCUSSION

The appeal in the instant case raises the preliminary question of whether the regional attorney erred in failing to assume, for purposes of determining whether the charge stated a prima facie case, that the factual allegations contained in the charge were true. In San Juan Unified School District (1977) PERB Decision No. 12, the Board held that in deciding whether to dismiss an unfair practice charge on the ground that it fails to state a prima facie violation of the EERA, all the essential facts alleged in the charge must be assumed to be true.

In the instant case, despite allegations in the amended charge that the disputed courses were "high school level, introductory courses . . . not advanced, community college level courses" and that the courses in questions were "the same as or similar to other language and social studies classes taught by members of the . . . unit," the regional attorney concluded that the courses were "community college courses." The regional attorney's failure to assume the truth of the factual allegations contained in the charge had a significant impact upon her

analysis of whether or not the charge stated a prima facie case. We must therefore reanalyze the charge assuming all of the facts stated therein are true.

In Fremont Union High School District (1987) PERB Decision No. 651, PERB noted the definition of "subcontracting" as set forth in Associate Justice Potter Stewart's concurring opinion in Fibreboard Paper Products Corporation v. NLRB (1964) 379 U.S.

203. "Subcontracting" was defined therein as the

. . . substitution of one group of workers for another to perform the same task in the same [location] under the ultimate control of the same employer.  
(379 U.S. at p. 224.)

In the majority opinion of the Court, Chief Justice Earl Warren stated that:

. . . contracting out . . . work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform is [a mandatory bargaining subject]. (379 U.S. at 210.)

In the case under consideration, the charging party has alleged that the District substituted community college teachers to teach, at the high school during regular school hours, high school language and social studies classes which could have been competently taught by unit members. Although the classes in question were "new" classes, the charging party alleged a past practice of having current staff teach new classes or hiring new unit members to teach the "new" classes. The charging party also alleged facts that, if proven, could result in a finding

that the "ultimate control" over the content of the courses rested with the District.

In Fremont, the PERB held the obligation to bargain with respect to effects extends "only to those immediate or prospective effects which are reasonably certain to occur and causally related to the nonnegotiable decision at issue." The regional attorney's improper assumption that the disputed classes were "college level classes" that could only be taught by credentialed community college teachers led her to conclude that the District's action had no effect on the unit. Assuming the truth of the facts alleged in the charge, we find that the District's actions may well have had "immediate or prospective effects" on the integrity of the unit.

Accordingly, we find that the charging party has stated a prima facie violation of EERA section 3543.5 by alleging that the District transferred or subcontracted work out of the bargaining unit without first providing the Association with notice and an opportunity to bargain about the decision and/or its effects.

#### ORDER

Based on the reasons set forth above, the Board REVERSES the regional attorney's dismissal of the charge and remands the case to the general counsel for issuance of a complaint pursuant to PERB Regulation 32640.

Members Craib and Camilli joined in this Decision.

Member Porter's concurrence and dissent begins on page 6.

Porter, Member, concurring and dissenting: I concur with the majority that a regional attorney may not resolve disputed facts and, for purposes of testing the sufficiency of the charges, must accept the charging party's alleged facts as true. But, putting aside any such improper findings of facts made by the regional attorney in this case,<sup>1</sup> and considering solely the facts alleged by the charging party in the amended charges, I must respectfully disagree with my colleagues that such factual allegations establish a prima facie case of an unlawful subcontracting or transfer of unit work.

The charging party negates a violation of EERA under the theory of an unlawful transfer of unit work by expressly alleging that the two new teachers (Nelson and Johnson) teaching the new classes "are not employees of the District, but are employees of the College of the Redwoods" (emphasis added). The charging party further fatally alleges that "[t]eachers Nelson and Johnson are paid directly by the College of the Redwoods and work under the terms and conditions of employment for College of the Redwoods instructors." As to establishing a prima facie case of an unlawful subcontracting, the charging party makes no factual allegations that the District had entered into any agreement or contract with the College of the Redwoods to provide teaching services to the respondent District. Accordingly, no prima facie

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<sup>1</sup>It is, of course, appropriate for the regional attorney to take official notice of any relevant Education Code statutes.

case of unlawful transfer of unit work or subcontracting has been alleged by the charging party. (See San Diego Community College District (1988) PERB Decision No. 662, dis. opn., pp. 26-32.)

With respect to the alternative theory that the District may have failed to bargain the "effects" of a "non-negotiable decision," the amended charges simply fail to make any factual allegations as to what decision, if any, the District made, and from which effects bargaining could stem.

While the facts alleged in the amended charges possibly suggest a violation of EERA on the basis that the District may have unilaterally changed a policy established by past practice, the charges still lack any factual allegations as to what action, if any, the respondent District took whereby employees of the College of the Redwoods commenced teaching the two new courses at a District school site. I would remand the case to the regional attorney with instructions to afford the charging party one last opportunity to further amend its charges to allege, if it can, facts necessary to establish a prima facie unlawful unilateral change in policy.